109-651

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 1024

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, A CORPORATION,
APPELLANT,

vs.

WILLIAM W. FUNGE, APPELLEE.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

FILED 14th October 1889.

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IN THE DISTRICT COURT

FOR THE FIRST JUDICIAL DISTRICT OF UTAH TERRITORY, WEBER COUNTY.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, a Corporation existing under and by virtue of the laws of the State of Wisconsin,

Plaintiff.

vs.

WILLIAM W. FUNGE,

Defendant.

COMPLAINT.

The Plaintiff complains and alleges:

I. That it is a corporation existing under and by virtue of the laws of the State of Wisconsin, with its corporate name as above styled ,and with its principal office of business at Whitewater, in the State of Wisconsin, and and that by and under said name and style of Winchester & Partridge Manufacturing Company and as such corporation, the defendant, a merchant of Ogden City, Utah, and doing business in said city, where he then and still resides, has transacted much business.

II. That the defendant, W. W. Funge, entered into a a written contract dated March 25, 1878, with Semple & Birge Manufacturing Company of St. Louis, Missouri, a copy of which is herewith filed as part hereof, marked "Exhibit A."

III. That the said defendant subsequently entered into another written contract with said Semple & Birge Manufacturing Company, dated December 6, 1878, a copy of which is filed herewith as part hereof, marked "Exhibit B."

IV. That by virtue of said contracts and especially the last one, he ordered from and received from the said Semple & Birge Manufacturing Company many wagons and fixtures. Until previous to May, 1879, said defendant had become indebted to the said Semple & Birge Manufacturing Company in the sum of Thirty-nine Hundred and Sixty-three Dollars and sixty-five cents, as per the statement of Semple & Birge Manufacturing Company, a copy of which is made part hereof and marked "Exhibit C."

V. That in the month of May, 1879, the Semple & Birge Manufacturing Company for a valuable consideration transferred said written contracts and the indebtedness of said defendant to this plaintiff, of which the defendant had due notice and a copy of said statement was in due time sent by mail after its date August 16, 1879, by this plaintiff to said defendant Funge, addressed to him at his main place of business and postage paid, to wit: Ogden City, Utah.

VI. That after the said transfer of said contracts and indebtedness of said defendant by said Semple and Birge Manufacturing Company and the sending to him of said statement as shown in said marked "Exhibit C," said defendant continued to pay on said indebtedness and make the purchases of this plaintiff until on November 28, 1879. The balance then due this plaintiff was Twen-

ty-eight Hundred and Thirty-two Dollars and Forty-two cents, as shown in their statement, to said defendant, of August 2, 1880, and a copy of which had previously been sent by mail, postage paid, to said defendant at his residence and place of business: Ogden City, Utah. A copy of said statement is herewith filed as part hereof, marked "Exhibit D."

VII. That the credit for $300.00, as of June 18, 1879, entered on "Exhibit C" was for a draft drawn by Semple & Birge Manufacturing Company and delivered to this plaintiff, which was forwarded to Ogden for payment by said defendant, but which he did not pay, so it was credited to said defendant as of June 20, 1879, and charged him as of July 7, 1879, in "Exhibit D," and said credit of $300.00 in "Exhibit C" is for the identical draft credited and charged in "Exhibit D" as aforesaid.

VIII. That plaintiff became urgent to have said indebtedness settled and liquidated but could get but one statement from the defendant and no other answer to their letter addressed to him at his said place of business and sent by mail, postage prepaid, a copy of which statement is herewith filed as part hereto, marked "Exhibit E."

IX. That having failed in getting said indebtedness by defendant to this plaintiff liquidated, plaintiff sent out said claim to W. W. Burton & Co., of Ogden, Utah, with directions as its agents to have said claim liquidated, but said defendant was then embarassed and in laboring circumstances and harrassed by some of his creditors and a great portion of his property and estate under mortgage for its full value and he unable then to pay said claim, and after delaying the matter one way and another he finally submitted to said Burton & Co. a proposition to settle said indebtedness, to be submitted to this plaintiff, and as the foundation of acceptance made out two lists of the various wagons he then claimed to have on hand in the

hands of his various agents in Idaho and Montana Territories, all of which he affirmed to be in good condition and merchantable order and so represented them to be to plaintiff's said agent and offered to turn them over to plaintiff on account of said debt. List No. 1 was the manufacturers prices for said wagons and to which he attached his affidavit dated October 6, 1880, a copy of said list and affidavit attached thereto is herewith filed as part hereof, marked "Exhibit F," and List No. 2 included the expense of transportation with manufacturers prices and ran the value up from $2,315.71 as in List No. 1 to $3,538 as in List No. 2, a copy of this latter list is filed as part hereof and marked "Exhibit G." And on the submission by their said agents of representation, affirmations, lists, and affidavit on List No. 1 to it, this plaintiff did authorize its said W. W. Burton & Co. to make settlement of said claim with said defendant on condition that said wagons were subject to said defendant's order and in good condition and merchantable order, and on the 28th day of October, 1880, said defendant did execute and deliver to said W. W. Burton & Co. for this plaintiff orders in the words and figures and on the several parties following, to wit:

OGDEN, UTAH TER., OCT. 1880.

James Burnside, Eagle Rock:

Please deliver the following size wagon to W. W. Burton & Co. or order: One 2¾ Whitewater Wagon, $125.00, or account to them for the same.

Very truly yours,

W. W. FUNGE.

OGDEN, U. T., OCT. 1880.

Messrs. Caplice & Smith, Missoula:

Please deliver to W. W. Burton & Co., or their order, the following Whitewater Wagons, or account to them for the same from this date:

1	3¼	Steel Skein,	$135.00	less	$10.00,	$125.00
1	3¼	Com. "	130.00	"	10.00,	120.00
1	3¾	" " top,	150.00	"	15.00,	135.00
						380.00

And oblige,

W. W. FUNGE.

OGDEN, U. T., OCT. 1880.

George Dart, Esq., Bannock:

Please deliver the following Whitewater Wagons to W. W. Burton & Co., or their order, and account to them for the same from this date:

1	3¼	Steel Skein,	$135.00	less	$10.00,	$125.00
1	3¼	Cast-steel "	125.00	"	10.00	115.00
						240.00

And oblige very truly yours,

W. W. FUNGE.

OGDEN, U. T., OCT. 1880.

Messrs. Kennon & Zenon, Deer Lodge:

Please deliver the following wagons (Whitewater) to W. W. Burton & Co., or their order:

1	4	inch,	$245.00	less	$15.00,	$230.00
1	3	"	125.00	"	10.00,	115.00
3	3¼	"	135.00	"	10.00,	375.00
						720.00

And account to them for the same from this date.

W. W. FUNGE.

OGDEN, U. T., OCT. 1880.

F. E. W. Patton, Virginia City:

Please deliver the following Whitewater Wagons to W. W. Burton & Co., or their order:

3	3¾ inch,	$130.00, - - -	$390.00	
4	3 "	125.00, - - - -	375.00	
2	2¾ "	125.00, - - -	250.00	
			1015.00	
		Less 10 per cent.,		$913.50

And account to them for the same from this date.

Very truly yours,

W. W. FUNGE.

OGDEN, U. T., OCT. 1880.

John Wells, Esq., Glendale:

Please deliver the following Whitewater Wagons to W. W. Burton & Co., or their order:

2	3½ inch wagons,	$140.00	less $12.00, - - -		$256.00
1	3¾ " "	155.00	" 12.00, - - -		143.00
1	3¾ " "	230.00	" 15.00, - - -		215.00
1	4 " "	238.00	" 15.00, - - - -		223.00
					837.00

And account to them for the same from this date.

Very truly yours,

W. W. FUNGE.

And at the same time and as part of the same transaction plaintiff's said agent executed and delivered to said defendant a conditional receipt bearing date October 28, 1880, and which said receipt said defendant then and there accepted with all its provisions, conditions, and statements, and which was delivered to and accepted by said defendant and has remained in his possession, a copy of which is herewith filed as part hereof and marked "Exhibit H," and it is averred and charged that it is a true copy of the original receipt so executed and delivered to the defendant and by him accepted, and he is required to bring said original receipt into Court and file it with his answer hereto. And said plaintiff avers that each and all of said orders should bear the same date and that the

blank in each and all of said orders should be filled with the figures "28" or words "twenty-eight" so that they should bear the date of October 28, 1880.

X. Plaintiff avers and states that when said orders were delivered to its said agents, Burton & Co., to wit: October 28, 1880, said wagon in the hands of James Burnside, Eagle Rock, Idaho Territory, was not in good condition and merchantable order but it had been exposed to the weather without proper storage and careful protection for a long time previous thereto and was greatly weather-beaten and injured thereby, and had been used and one bolster was then broken and thereby greatly injured and that it was not reasonably worth over Seventy-five Dollars when said order on Burnside was given for it by the defendant, whereas if it had been in good condition and merchantable order and as stated by the defendant it would reasonably have been worth One Hundred and Twenty-five Dollars and could have been sold for that sum over and above the expense of the sale with reasonable effort, whereas it could only be sold for Seventy-five Dollars after diligent effort because of its being so injured as aforesaid and was by said agents sold for Seventy-five Dollars. That the three wagons in the hands of Caplice & Smith, Missoula, Montana Territory, and for which the said order on them was executed as aforesaid were not, when said order was executed and delivered to plaintiff's said agent, in good condition and merchantable order but for a long time previous thereto had not been properly stored and carefully protected and had been exposed to the weather without protection and shelter and were then greatly weather-beaten and injured and after due and reasonable diligence and effort to sell the same only two of said wagons could be sold and for the sum of Two Hundred and Thirty Dollars which was all that they were then reasonably worth in the then condition of said wagons, and the other wagon could not be sold and was al-

most worthless, not being worth One Hundred Dollars in its then condition, whereas had said wagons been in the condition so represented by said defendant they would reasonably have been worth Three Hundred and Eighty Dollars and could have been sold for that sum with reasonable and ordinary diligence over and above, and after paying expenses of the sale and deducting the same.

That the two wagons in the hands of George Dart, Bannock, Montana Territory, and for which the order on him was given by said defendant, had not been properly stored and protected from the weather, but for a long time previous to the giving of said order said wagons had been exposed to the weather without shelter of any kind, and had thereby become greatly weather-beaten and injured and one of said wagons had previously thereto been used and one spoke of one of the wheels of one of said wagons had been and then was broken, and thereby said wagon was greatly injured; that said wagons so then in said Dart's hands in their then condition when said order was given were not reasonably worth over One Hundred and Ninety Dollars and that amount was all that they could be sold for after due and reasonable diligence, and ordinary diligence had been used by plaintiff and its said agents to make a sale and said wagons were sold for that sum by plaintiff's said agents, whereas had said wagons been in the condition and order as represented by defendant at and before the giving of said order said wagons would reasonably have been worth Two Hundred and Forty Dollars and could have been sold for that sum with reasonable effort over and above and after paying expense of sale and would have netted the above last mentioned sum and was reasonably worth said sum over and above reasonable expenses of sale.

That the five wagons in the hands of Kinnon & Zenor of Deer Lodge, Montana Territory, and for which said order on them was given by the defendant were not,

when said order was given and delivered as aforesaid, in good order or merchantable condition; had not been properly stored and cared for, but for a long time previous thereto had been exposed to the weather without any shelter and were greatly weather-beaten and injured and were not then reasonably worth more than Four Hundred and Thirty-three Dollars and sixty cents and could not, with reasonable, ordinary and due diligence, be sold for a greater sum, and said wagons were sold for that sum by plaintiff's agents, whereas had said wagons been in the order and condition represented to be in by said defendant at the time and before the executing and delivering said order, said wagons would have reasonably been worth the sum of Seven Hundred and Fifty-five Dollars and could reasonably have been sold for that amount and would have netted the sum of Seven Hundred and Twenty Dollars after allowing Thirty-five Dollars on commission for selling the same.

That when the order was executed and delivered by defendant for nine wagons on F. E. W. Patton, Virginia City, Montana Territory, said defendant did not have nine wagons in his hands but had only five wagons and said five wagons were not in good or merchantable order or condition, but said wagons had, for a long time previous to the giving of said order been exposed to the weather without any shelter whatever and were thereby greatly injured and lessened in value and were not reasonably worth over Five Hundred Dollars at the time of giving said order and said five wagons were sold for Five Hundred Dollars by said agents, whereas had all of said wagons then been in said Patton's hands and in the order and condition which defendant before and at the time of giving said order had represented them to be in, said wagons would reasonably have been worth Ten Hundred and Fifteen Dollars, or after paying commission for sales netted the sum of Nine Hundred and Thirteen Dollars

and fifty cents, and could with reasonable and ordinary diligence have been sold so as to have netted Nine Hundred and Thirteen Dollars and fifty cents after having paid expenses of sale.

That the five wagons in the hands of John Wells, at Glendale, Montana Territory, and for which the said order on him was executed and delivered by said defendant as aforesaid, were not at and before the delivery of said order in good order and merchantable condition nor had they been properly stored and protected from the weather, but on the contrary, they had for a long time previous to the giving of said order been exposed to the weather without any shelter or storage, and had become greatly weather-beaten and injured thereby, and so greatly injured and damaged that only four could be sold after due and ordinary, or even extraordinary diligence, and that for only Four Hundred Dollars, and which were reasonably not worth over Four Hundred Dollars; whereas, had said wagons been in the order and condition as represented by said defendant at and before the giving said order, said wagons would reasonably have been worth the sum of Eight Hundred and Ninety-one Dollars, and could reasonably have been sold for that amount, and would reasonably have netted the sum of Eight Hundred and Thirty-seven Dollars after deducting the expenses of sales. The wagon left is worth but a nominal sum. Plaintiff says that the wagon turned over by defendant to plaintiff's said attorney was not in good condition and merchantable order that it had not been properly stored and protected, but had been left exposed for a long time to the weather without shelter or protection, and was so greatly injured thereby as to be almost worthless and entirely unsalable; it had only the running gear, and that not complete, was without a bed, and really so badly weather-beaten and injured that it could not be sold even at greatly reduced price, although plaintiff's said agent used all proper and even extraordinary diligence and effort to sell

the same, and it yet remains unsold, has no tongue nor stay chain, nor double-tree, nor whipple-tree.

XI. That said defendant had not and did not provide necessary storage and careful protection of said wagons and each of them, as he undertook, agreed, covenanted to do, by both and each of the said written contracts dated March 25th, 1878, but on the contrary had permitted said wagons and each of them to remain unprotected by house or shelter, exposed to the weather from the time he received them until the executing and delivery of said order October 28th, 1880, and by which want of care and attention, proper storage and shelter, said wagons and each of them had become and were greatly injured and lessened in value and were not when said orders were delivered, in the condition represented by him, nor were they in the condition specified in the receipt "Exhibit H" herein executed and delivered by plaintiff's said agents Burton & Co. to said defendants, dated October 28th, 1880, to wit: "in good condition and merchantable order," but were then in bad condition and unmerchantable order, and of greatly less value than if in the condition so represented by said defendant.

That neither plaintiff nor its said agents had ever examined the condition of said wagons or any of them, but relied entirely on the statements and representations of said defendant as to the condition and order and value of said wagons and each of them, but which representations were false and untrue.

That said plaintiff used due and reasonable and ordinary diligence and exertion in trying to sell said wagons by and through their said agents Burton & Co., who did, within a very few days and within reasonable time, write to the several parties and caused to be written to them, who held said wagons and on whom said orders were drawn, notifying them and each of them of said orders so drawn on them, and directing and requesting them to

to make immediate sales of said wagons, or sales as soon as practicable, and which said parties agreed to do, but failed to make such sales, and after delaying for a reasonable time said agents, Burton & Co., sent one of their firm to the several places where said wagons were on deposit, and to the several persons having custody thereof, and their said agents did sell the wagons hereinbefore specified as being sold at the prices specified and at the expense herein specified, and did then and there sell said wagons at their fair cash market value at the time and condition they were in, when said orders were executed and delivered, and said expense was but reasonable and fair expenses of traveling and for compensation, for the time of said agents so consumed in procuring said sales, and that the aggregate sales of said wagons so sold amounted to only the sum of Twenty-one Hundred and Thirty-two Dollars and sixty-three cents, and that the actual and necessary expense of selling of said wagons amounted to Three Hundred and Twenty-four Dollars and Eighty cents, leaving after deducting said expense account only the net sum of Eighteen Hundred and Seven Dollars and Forty-three cents.

XII. That within a reasonable time after such sales, to wit: about the 21st day of October 1881, plaintiff's said agents notified said defendant of said sales, the amount thereof and amount of the expenses of making said sales, and of the number, place, and in whose hands the unsold wagons were and remained, and that all and each of such unsold wagons remained subject to his order, and which notice was in writing, signed by said plaintiff's agents, Burton & Co., and delivered to the defendant, and who has never returned the same to plaintiff or its said agents, but has kept the same. And said defendant is required to bring said written notice into court, and file it with his answer, but to take said wagons or either of them the defendant has failed, neglected, and refused to do, and said wagons have ever since remained

and now remain subject to said defendant's order, except the four wagons sold since, which were then in the hands of said John Wells, at Glendale, and the amount thereof included in the above and preceding section of this complaint.

Wherefore, plaintiff demands judgment in this court for Fourteen Hundred and Forty-four Dollars and Ninety cents with interest thereon from the date of filing hereof at the rate of ten per cent per annum and its costs, etc.

SECOND.

And for further cause of action the said plaintiff states and alleges:

I. That the defendant entered into a written contract dated March 25th, 1878, with Semple & Birge Manufacturing Company, of St. Louis, Missouri, a copy of which is filed herein as part hereof marked "Exhibit A."

II. That said defendant subsequently entered into another written contract with the said Semple & Birge Manufacturing Company dated December 6th, 1878, a copy of which is herein filed as "Exhibit B," and made part hereof.

III. That under and by virtue of said contracts and especially the latter one said defendant ordered divers and sundry wagons and fixtures from said Semple & Birge Manufacturing Company, which said Manufacturing Company had delivered to him or his orders until previous to May, 1879, said defendant had become indebted to said Semple & Birge Manufacturing Company in the sum of Thirty-nine Hundred and Sixty-three Dollars and sixty-five cents, as per statement of Semple & Birge Manufacturing Company, a copy of which is filed herein as "Exhibit C," and referred to as part hereof.

IV. That in the month of May, 1879, the Semple & Birge Manufacturing Company, for a valuable consideration, transferred said written contracts and the said in-

debtedness of the defendant to this plaintiff, and of all which the defendant had due notice and a copy of said statement, "Exhibit C," was in due time sent per United States mail, postage prepaid, addressed to defendant at Ogden, Utah, his then place of business, to wit: in the month of August, 1879, and 16th day thereof.

V. That after the said transfer to this plaintiff of said contracts and said indebtedness of the defendant by said Semple and Birge Manufacturing Company, and after said notice to him of said transfer, and after sending to him, and the receipt by him, of the said statement of his said indebtedness, as set out in "Exhibit C," said defendant continued without complaint, to make other purchases of this plaintiff, and make payment until November 28, 1879; the balance then due to said plaintiff was Twenty-eight Hundred and Thirty-two Dollars and forty cents ($2832.40), as shown by plaintiff's statement to said defendant of August 2d, 1880, a copy of which is filed with this complaint, "Exhibit D," and here referred to as part hereof, and which said statement was sent to defendant, postage prepaid, through the United States mail, addressed to him at his then place of business, Ogden City, Utah Territory, and which he received in due course of mail.

VI. That on———day of August, 1879, an account was started between this plaintiff and the defendant, and upon such statement, the sum of Thirty-six Hundred and Sixty-three Dollars and sixty-five cents was found due to the plaintiff from the defendant.

That on the———day of August, 1880, the plaintiff and defendent again stated their accounts, and upon such statement, a balance of Twenty-eight Hundred and Thirty-two Dollars and forty cents was found due from the defendant to this plaintiff, and all of which still remains due and unpaid, except as to the credit hereinafter specified, to wit: the net proceeds of certain wagons sold by

plaintiff's agents, amounting to Fourteen Hundred and Seventeen Dollars and eighty-three cents, an account of which was rendered to defendant on or about October 20th, 1881, and the net proceeds of four wagons then in the hands of John Wells, of Glendale, and which were sold about the last of February, 1882, for Four Hundred Dollars less the expense of sale, leaving a net credit of Three Hundred and Ninety Dollars. That said amount so found due to this plaintiff should bear interest at the rate of ten per cent. per annum from said day of August, 1880, until said 21st of October, 1881, and amounting to the sum of Three Hundred and Twenty-two Dollars and fifty-six cents, and after applying said credit of $1417.83 left a balance due this plaintiff of Seventeen Hundred and Thirty-seven Dollars, upon which interest at the rate of ten per cent. per annum should be allowed for four months, amounting to the sum of Fifty-seven Dollars and ninety cents, and after deducting from the principal sum and said interest said credit for $390, left still due as of the date of filing of this complaint, the sum of Fourteen Hundred and Fifty-four Dollars and ninety cents.

Wherefore plaintiff demands judgment for Fourteen Hundred and Forty-four Dollars and ninety cents, together with interest at the rate of ten per cent. per annum thereon from the date of filing hereof, and its costs.

R. K. WILLIAMS,
Attorney for Plaintiff.

"EXHIBIT A."

OGDEN, Utah, March 25th, 1878.

Messrs. Semple & Birge Manufacturing Co., St. Louis, Mo.

GENTS—Please prepare and ship me, at your earliest convenience, the following Whitewater wagons at prices named on cars at Whitewater, Wis.:

Six (6) 3 in. thimble skein complete, with Haller brake, bow and staple, the price of each, $69.00

Seven (7) 3½ in. skein complete as above, price, each, $73.00

Four (4) 3½ in. thimble skein, complete as above, price, $76.00

One (1) 3¾ in. thimble skein, sq. Hawn, complete as above, price each, $79.00

One (1) 4 in. thimble skein, sq. Hawn, complete as above, price each, $86.00

One half of three (3) in.—3¼ and 3½ to be round Hawn, price extra to be 75 cents each.

In consideration of this order you agree to sell the Whitewater wagon to no other parties in Ogden, Utah, and all the territory lying north in Utah and south Idaho, and the Montana trade, during the year 1878.

Except one of each 3 in. 3¼ and 3½, all wagons to be wide-track and middle-sized beds. I hereby agree to receive the above, pay freight and charges from the factory, insure them against loss by fire, or any other cause, and provide necessary storage and careful protection, free of all charges, and to hold the same in good condition at all times, subject to your order, free of charge, except for actual freight. I further agree to use due diligence in selling, and to remit you in St. Louis or New York exchange for each wagon, at the above net prices, soon as sold, or remit purchaser's note, with interest, for four months with my endorsement, said note to be given after six days from date of invoice longer than for two (2) months; I also agree if at the end of four months any of the above remain unsold, will at that time, or any time thereafter when required by Semple Birge & Co., buy and pay for the same at invoice price either by cash or satisfactory note, due in sixty days with ten per cent. interest and Exchange on St. Louis. I further agree to maintain the good reputation of the Whitewater wagon

and sell it to the exclusion of all others while this agreement remains in force, shipping directions, as follows:

* * * * * *

REMARKS—It is also agreed that the wagons are to be made of good material, and are guaranteed to stand this climate equal to any wagon sold in this Territory. You also agree to make good all defects.

Yours respectfully,

W. W. FUNGE.

Semple & Birge Manufacturing Co.
Per A. H. Bliam.

"EXHIBIT B."

Agreement entered into this the 6th day of December, 1878, by and between the Semple & Birge Manufacturing Company of the city of St. Louis, in the State of Missouri, of the first part, and W. W. Funge, of the city of Ogden, in the Territory of Utah, of the second part. *Witnesseth:* The Semple & Birge Manufacturing Company, party of the first part, hereby agrees to furnish to W. W. Funge, party of the second part, Whitewater farm and freight wagons at prices hereinafter named on the cars at Whitewater, Wisconsin, which said W. W. Funge, party of the second part, hereby agrees to receive, pay freight and charges from factory, insure them against loss by fire, or any other cause, and provide the necessary storage and careful protection, free of all charge, and to hold the same in good condition at all times, subject to the order of the said Semple & Birge Manufacturing Co., party of the first part, free of all charges, except for all actual railroad freight; also to use due diligence in selling said wagons, and to remit to the said Semple & Birge Manufacturing Company, party of the first part, in St.

Louis or New York exchange, for each wagon, as soon as sold, at the net prices named, or if sold on time, to remit purchaser's note, bearing interest at twelve per cent. from date until paid, and at a higher rate if possible after maturity, with the endorsement of said W. W. Funge, party of the second part, said notes not to be taken for a longer period than six months from date of sale.

Also said W. W. Funge, party of the second part, hereby agrees, when required by the Semple & Birge Manufacturing Co., party of the first part, to buy and pay for all the wagons on hand at the invoice price, either by cash or by satisfactory notes, due in three equal payments of six, eight, and ten months with interest at the rate of ten per cent. and exchange on St. Louis. And further agrees to maintain the good reputation of the Whitewater wagon and sell the same to the exclusion of all others while this agreement remains in force. Prices of wagons to be as follows:

For 2⅞ in. Thimble Skein, complete with Eastern bed, spring seat, roller brakes, eveners, neck-yoke, stay-chains, bows, and staple, Sixty-seven Dollars and seventy-five cents ($67.75). For 3 in. Thimble Skein, complete as above, Sixty-nine Dollars ($69.00). For 3¼ in. Thimble Skein, complete as above, Seventy-three Dollars ($73.00). For 3½ in. Thimble Skein, complete as above, Seventy-six Dollars ($76.00). For 3¾ and four inch, complete as above, the price is to be determined upon. Extra in addition to the above, for stiff tongues, each $2.50. For feed boxes and bolts, each $1.00. Bent hawns, each 75 cents.

Prices parts of wagons as follows:

Spring Seats, each $2.50; roller brakes, each $7.65; bed, complete, $9.50; California stake rack beds, extra, $9.00. Furthermore the said Semple & Birge Manufacturing Co., party of the first part, hereby agrees to sell wagons to no other party in Ogden, Utah, or in all the

territory lying north of Ogden in Utah, or in the eastern half of Idaho, and in Montana Territory, during the life of this instrument.

Also the said Semple & Birge Manufacturing Co., party of the first part, guarantees said wagons to be made of good material and to stand equally with any wagon sold in above-named territory. Also agree to furnish new parts to supply defectiveness. Said W. W. Funge, party of the second part, further agrees that the freight on wagons held subject to order may be paid by any note or notes having been taken by the Semple & Birge Manufacturing Co., in payment for wagons, that they may designate, or said freight may be paid in such wagons on hand as the Semple & Birge Manufacturing Co. may designate at the invoice of prices.

It is further understood and agreed that the said Semple & Birge Manufacturing Co., party of the first part, may terminate this agreement at their option. Also it is agreed that W. W. Funge, party of the second part, may terminate this agreement at any time after one year from the date of this instrument, by giving sixty days' notice of such intention, in which case, said W. W. Funge agrees to pay cash for all wagons on hand, when demanded by the said Sample & Birge Manufacturing Co., party of the first part.

In witness whereof, we have hereunto set our hands and seals this the 6th day of December, 1878.

W. W. FUNGE. [SEAL.]

"EXHIBIT C."

MONTHLY STATEMENTS:

ST. LOUIS, August 16th, 1878.

Mr. W. W. Funge, Ogden, Utah,

In acc't with SEMPLE & BIRGE MANUFACTURING CO.

Remit by express, prepaid, money orders, 910 and 912 Washington Avenue, or draft on St. Louis.

All bills subject to sight draft at maturity without notice.

1878.				
May 15.	To Mdse, Wagons	1258 50		
June 29.	" " "	75 00		
July 18.	" " "	1445 45		
Aug. 6.	" " "	1361 90		
Aug. 6.	" " "	142 00		
Oct. 5.	" " "	1264 45		
				5547 30
	Credit.			
Aug. 7.	By Cash	500 00		
Sept. 4.	" Notes	227 50		
" 14.	" "	331 10		
" 21.	" "	301 20		
Oct. 22.	" "	101 80		
Nov. 25.	" "	235 00		
Dec. 11.	" "	667 25		
" 11.	" "	333 00		
" 24.	" "	110 00		
" 30.	" "	125 10		
				4196 40
1879.				
Mch. 30.	" "	1264 45		
				1350 90
Mch. 25.	To Mdse. Wagons	1298 93		
April 9.	" " "	1313 82		2612 75
1879.				3963 65
June 18.	By Cash, Cr...			300 00
				3663 65

"EXHIBIT D."

WHITEWATER, Wis., Aug. 2nd, 1880.

Mr. W. W. Funge, Ogden, Utah,

In acc't with WINCHESTER PARTRIDGE MF'G CO.,
Whitewater, Wis.

1879.		
May 24.	To balance wagon acc't with Semple & Birge Mf'g Co. as per statement and transfer voucher herewith.....	3963 65

Credit.

June 20.	By S. & B. Mf'g Co's draft on you,...			300 00
July 7.	To S. & B. Mf'g Co's draft returned unpaid.....	300 00		
Sept. 15.	To Mdse	86 50		
" 18.	" Extra short on wagon turned over to W. W. Burton & Co. (as per mail)	10 25		

Credit.

July 12.	By repairs allowed.....		71 60
" 22.	" Notes.....		185 75
Aug. 25.	" "		111 00
" 26.	" Wagon to W. W. Burton & Co.....		491 83
Sept. 20.	" Notes.....		152 85
Nov. 7.	" Rebate allowed on stock on hand		55 00
" 28.	" Cash		123 00
	Balance.....		2832 42
		4360 40	4360 40

Dr.

1879.			
Nov. 28.	To balance.....	2832 40	

"EXHIBIT E."

STATEMENT OF WAGONS ON HAND.

OCTOBER 25TH, 1879.

1	2¾	Steel Skein, wide track.....	73 80	73 80
3	2¾	Cast " " "	68 20	204 60
5	3	Steel " " "	70 95	354 75
2	3	" " " "	76 33	
4	3¼	" " " "	80 62	322 48
8	3¼	Cast " " "	74 55	596 40
2	3½	" " " "	77 55	155 10
3	3½	Steel " " "	84 20	252 60
2	3¾	Cast, old style, last year, allow 5 ea.....	79 50	159 00
1	2¾	Steel, freight wagon track, allow 10.60.....	187 00	172 50
2	4	Cast, old style, last year, allow 5 ea.....	98 00	196 00
1	4	Steel, (freight wagon) allow $15.00.....	183 00	183 00
1	4	Cast Skein, new, allow 10.....	172 50	178 00
				3000 89
		Allow as above.....		55 00
				2945 89

"EXHIBIT F."

Number of wagons on hand and in the hands of the following parties:

JAMES BURNSIDE, Eagle Rock.

1	2¾	Steel Skein	73 60	73 60

CAPLICE & SMITH, Missoula.

1	3¼	Steel Skein	80 62	
1	3¼		75 30	
1	3¾	Flat bed	92 00	249 92

GEO. DART, Bannock.

1	3¼	Steel Skein	80 62	
1	3¼		75 30	155 92

KENNON & ZENOR, Deer Lodge.

1	4 in.	Steel Skein	183 00	
1	3 "	" "	76 33	
1	3¼ "	" "	80 62	
2	3¼ "	" " 75.30	150 60	490 55

PATTON & LAMBRECHT, Virginia City.

2	3¼ in.	Steel Skein	80 62	161 24
1	3 "	" "	76 33	76 33
3	3 "	" "	70 95	212 80
1	3¼ "	" "	75 30	75 30
2	2¾ "	" "	68 20	136 40

JOHN WELLS, Glendale.

1	3½	Wagon, Steel Skein	84 20	
1	3½	"	77 55	
1	3¾	S. T.	95 80	
1	3¾	Steel Skein, fr't	178 00	
1	4		172 50	608 05

W. W. FUNGE, Ogden.

1	3½		77 55	77 55

2315 71

TERRITORY OF UTAH, County of Weber. } ss.

W. W. Funge being first duly sworn deposes and says that the wagons enumerated in the within and foregoing statement are some of the identical Whitewater wagons which he purchased of the Semple & Birge Manufacturing Co., pursuant to contract dated December 6th, 1878. That none of said wagons have been sold by him, although he has used more than ordinary diligence in trying to sell the same, and that all said wagons above specified are now subject to his orders and in the possession of the respective parties named in said statement.

W. W. FUNGE.

Subscribed and sworn to before me this 6th day of October, 1880.

[SEAL.] F. S. RICHARDS,
Notary Public for Weber County, Utah Territory.

"EXHIBIT G."

OGDEN, Utah, Oct. 6, 1880.

Statement to Winchester & Partridge of W. W. Funge, Jobber and retail dealer in hardware, cutlery, steel and nails, mechanics' and farmers' tools, loose and fixed ammunition, tinware, tinners' stock.

JAMES BURNSIDE.

1	2¾	Steel Skeins	125 00

CAPLICE & SMITH.

1	3¼	Steel Skeins	130 00
1	3¾	" "	150 00
1	3½	" "	135 00

GEORGE DART.

2	3¼	Steel Skeins	170 00

KENNON & ZENOR.

1	4 in. Steel Skein		245 00
1	3 in.	Wagon	125 00
1	3¼ "	C. L.	135 00
1	3¼ "	"	135 00
1	3¼ "	"	135 00

PATTON & LAMBRECHT.

2	3½ Steel Skein		271 00
1	3		125 00
1	3		125 00
1	3½		130 00
1	2¾		125 00
1	3		125 00
1	2¾		125 00
1	3		125 00

JOHN WELLS.

1	3½	Wagon	140 00
1	3½	"	140 00
1	3¾	"	155 00
1	3¾	"	230 00
1	4	"	238 00
			$3538 00

The above figures represent prices of wagons at the respective places, including cost and freight.

"EXHIBIT H."

OGDEN, Utah, October 28th, 1880.

Received from W. W. Funge order on the respective parties named in the annexed list for wagons therein mentioned, which wagons are to be received in payment of the claim of Winchester & Partridge Manufacturing Co. against said Funge for Twenty-eight Hundred and Thirty-two Dollars and forty-two cents. Provided the said wagons are delivered to said Winchester & Partridge Man'f'g Co. or their agents, W. W. Burton & Co., in good condition and merchantable order at the respective places named and as set forth in said orders on presentation

thereof, and it is understood and agreed that if said wagons are so delivered in good condition, and promptly as aforesaid, they are to be sold to the best advantage and for the highest prices that can be obtained for them, and any surplus of the proceeds thereof that may remain after paying said debt of $2832.42 and the actual and necessary cost of selling the same is to be refunded to said Funge, unless prior to that time he shall have been paid Two Hundred Dollars ($200) which he agrees at their option to take in lieu of said samples and in full settlement of his account with said Company.

W. W. BURTON & Co.

Territory of Utah, }
County of Weber. } ss.

Lester J. Herrick, being duly sworn, deposes and says that he is an agent of the plaintiff in the above-entitled action: that he has heard read the foregoing complaint and knows the contents thereof, that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true. That the said plaintiff is absent from the said Weber County and Utah Territory, where affiant resides, and the facts are within the knowledge of this affiant, who is agent for the said plaintiff, and therefore he makes this affidavit.

L. J. HERRICK.

Subscribed and sworn to before me this 1st day of March, 1882. R. K. WILLIAMS,

[SEAL.] Notary Public.

Territory of Utah, }
County of Weber. } ss.

I, A. C. Emerson, Clerk of the First Judicial District Court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original com-

plaint and summons in the above-entitled cause in my office.

Witness my hand and the seal of said Court, at Ogden City, this 15th day of March, A. D. 1882.

A. C. EMERSON, Clerk. [SEAL.]

No. 188. District Court,
County of Weber.

Winchester & Partridge, Plaintiff,
vs.
W. W. Funge, Defendant.

Complaint.

Filed March 9th, 1882.

A. C. EMERSON, Clerk.

In the District Court of the First Judicial District of the Territory of Utah, Weber County.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, a Corporation existing under and by virtue of the laws of the State of Wisconsin, Plaintiff.

vs.

WILLIAM W. FUNGE, Defendant.

SUMMONS.

The People of the Territory of Utah send greeting to W. W. Funge, defendant. You are hereby required to appear in an action brought against you by the above named plaintiff in the District Court of the First Judicial District of the Territory of Utah, and to answer the complaint filed therein within ten days (exclusive of the day of service) after thes ervice on you of this summons, if served within this County, or, if served out of this

County, but in the District, within twenty days; otherwise within forty days, or judgment by default will be taken against you according to the prayer of said complaint.

The said action is brought to obtain a judgment of this court for the sum of $1444.90, with interest thereon from March 9th, 1882, at 10 per cent. per annum, alleged to be due and owing from defendant to plaintiff, on a written contract and agreement, made by and between this defendant and Semple & Birge Manufacturing Co., which same is set forth in the complaint herein. Said sum alleged to be a balance due to this plaintiff from defendant, as agent for said Semple & Birge Manufacturing Co., as damages in failing to comply with the terms of said contract; also for costs of suit; all of which more fully appears from the complaint filed herein. And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for the sum of $1444.90, with interest and costs as above.

Witness the Hon. Philip H. Emerson, Judge, and the seal of the District Court of the First Judicial District in and for the Territory of Utah, this 15th day of March, in the year of our Lord, One Thousand Eight Hundred and Eighty-two.

A. C. EMERSON, Clerk. [SEAL]

No. 188. COPY.

District Court, First Judicial District,
County of Weber.

Winchester & Partridge Man'f'g Co., Plaintiff,
vs.
W. W. Funge, Defendant.

Summons.

R. K. WILLIAMS, Plaintiff's Attorney

In the District Court of the First Judicial District of the Territory of Utah, County of Weber.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, a Corporation existing under and by virtue of the laws of the State of Wisconsin. Plaintiff,

vs.

William W. Funge, Defendant.

DEMURRER TO COMPLAINT.

Comes now the above-named defendant, by Kimball & Heywood, his attorneys, and demurs to the complaint of plaintiff on file in said action, and for ground of demurrer alleges:

1st—That said complaint does not state facts sufficient to constitute a cause of action.

2d—The said defendant further demurring to said complaint, and for a separate demurrer to the first count, paragraph, or sub-division of said complaint, says that said first count, paragraph, or sub-division, does not state facts sufficient to constitute a cause of action against him.

3rd—The said defendant further demurring to said complaint and for a separate demurrer to the second count, paragraph or subdivision of said complaint says that said second count, paragraph or subdivision does not state facts sufficient to constitute a cause of action against him. Wherefore he prays judgment, &c.

KIMBALL & HEYWOOD,

Attorneys for Defendant.

TERRITORY OF UTAH,
County of Weber. } ss.

Wm. W. Funge, being duly sworn deposes and says that he is the defendant in the above entitled action and that this demurrer is not interposed for delay merely.

W. W. FUNGE.

Subscribed and sworn to this 24th day of March, A. D. 1882, before me, a Notary Public.

[SEAL.] JAMES N. KIMBALL, Notary Public.

Endorsed.

In the District Court of the First Judicial District.

Winchester & Partridge Manuf'g Co.,
vs.
William W. Funge.

Demurrer to Complaint.

Received service this 25th day of March, 1882.

R. K. WILLIAMS, Att'y for Plaintiff.

Filed March 25, 1882.

A. C. EMERSON, Clerk.

KIMBALL & HEYWOOD, Att'ys for Defendant.

Territory of Utah,
County of Weber. } ss.

I, A. C. Emerson, Clerk of the First Judicial District Court of Utah Territory, do hereby certify that the foregoing is a full, true and correct copy of the original Demurrer to Complaint in the above-entitled cause now on file in my office.

Witness my hand and the seal of said Court, at Ogden City, this 5th day of June, A. D. 1882.

A. C. EMERSON, Clerk.

In the District Court, First Judicial District of the Territory of Utah, County of Weber:

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, a corporation under and by virtue of the laws of the State of Wisconsin, Plaintiff,
vs.
WILLIAM W. FUNGE, Defendant.

JUDGMENT BY THE COURT, THE 3D DAY OF JUNE, A.D. 1882.

This cause came on to be heard before the Court on the 1st day of May, A. D. 1882, upon the demurrer of the defendant to the complaint on file therein. After argument on the said demurrer by the counsel for the respective parties, the said cause was by the Court taken under advisement. Now at this day comes the Court, and being sufficiently advised in the premises, does order that the said demurrer of the said defendant be and the same is hereby sustained, and the plaintiff electing to stand by its complaint. It is ordered that the judgment be entered in said cause in favor of the defendant and against said plaintiff.

Wherefore, by reason of the law and the premises aforesaid, it is ordered, adjudged, and decreed, that Wm. W. Funge, the defendant, go hence without day, and that said plaintiff take nothing by its said complaint, and that said defendant do have and recover of said plaintiff his costs and disbursements incurred in this action, taxed at twenty-four dollars.

PHILIP H. EMERSON, Judge.

Endorsed.

In the District Court, First Judicial District.

Winchester & Partridge Manufacturing Co.,
vs.
William W. Funge.

Judgment.

Filed and entered June 3rd, 1882.

A. C. EMERSON, Clerk.

Territory of Utah, } ss.
County of Weber. }

I, A. C. Emerson, Clerk of the First Judicial District, Court of Utah Territory, do hereby certity that the foregoing is a full, true, and correct copy of the original Judgment made and entered in the above entitled cause as appears of record in my office.

Witness my hand and the seal of said Court, at Ogden City, this 5th day of June, A. D. 1882.

[SEAL.] A. C. EMERSON, Clerk.

In the District Court for First Judicial District of Utah Territory, Weber County.

Winchester & Partridge Manufacturing Co., Plaintiff,
vs.
WILLIAM W. FUNGE, Defendant.

NOTICE OF APPEAL.

The defendant and his counsel will please take notice that the plaintiff in the above-entitled action hereby appeal to the Supreme Court of Utah Territory from the judgment therein made and entered in the said District Court on the third day of June, 1882, in favor of the defendant in said action, and against the said plaintiff, and from the whole thereof, this 10th day of October, 1882.

R. K. WILLIAMS, Attorney for Plaintiff.

Endorsed. No. 188.

Winchester & Partridge Manufacturing Co.,
vs.
W. W. Funge.

Notice of Appeal.

Service acknowledged this October 10th, 1882.

KIMBALL & HEYWOOD,
Attorneys for Defendant.

Filed October 10th, 1882.

A. C. EMERSON, Clerk.

Territory of Utah, }
County of Weber, } ss.

I, A. C. Emerson, Clerk of the First Judicial District Court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original notice of appeal in the above entitled cause, now on file in my office.

Witness my hand and seal of said Court at Ogden City, this 13th day of October, A. D. 1882.

[SEAL] A. C. EMERSON, Clerk.

In the Supreme Court of Utah Territory.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, Appellants.
vs.
WILLIAM W. FUNGE, Respondent.
} ON APPEAL FROM 1ST DIST. COURT.

In the above-entitled cause it is ordered that the appellant need not have the record printed, nor his counsel's brief or argument, but if he does not then he must serve respondent's counsel with the manuscript brief or argument of his counsel by delivering a copy.

P. H. EMERSON, Judge.

Endorsed. No. 188.

In the First District Court,

Winchester & Partridge Manuf'g Co.,
vs.
W. W. Funge,

Order dispensing with printing.

Filed October 10th, 1882.

A. C. EMERSON, Clerk.

Territory of Utah,
County of Weber. } ss.

I, A. C. Emerson, Clerk of the First Judicial District Court of Utah Territory, do hereby certify that the foregoing is a full, true, and correct copy of the original Order Dispensing with Printing of Record, in the above cause, made and entered October 10th, 1882, as appears of record in my office.

Witness my hand and the seal of said Court at Ogden City, this 13th day of October, A. D. 1882.

A. C. EMERSON, Clerk. [SEAL.]

Winchester & Partridge Man'f'g Co.,
vs.
W. W. Funge,

Transcript.

Filed October 21st, 1882.

E. T. SPRAGUE,
Clerk of Supreme Court.

In the District Court of the First Judicial District of the Territory of Utah, County of Weber.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY,
Plaintiff.
vs.
WILLIAM W. FUNGE,
Defendant.

Whereas, the plaintiff in the above-entitled action is about to appeal to the Supreme Court of Utah Territory from a judgment rendered against it in said action in this said District Court, and in favor of the defendant for Twenty-four Dollars costs, and entered on the third day June, 1882.

Now, therefore, in consideration of the premises, and of such appeal, we the undersigned, residents of the County of Weber and Territory of Utah, do hereby jointly and severally undertake and promise, on the part of appellant that it will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding Three Hundred Dollars, to which amount we acknowledge ourselves jointly and severally bound.

Witness our hands and seals this 3rd day of July, 1883.

LESTER J. HERRICK, [SEAL.]
WILLAM W. BURTON. [SEAL.]

Territory of Utah,
County of Weber. } ss.

Lester J. Herrick and William W. Burton, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally duly sworn each for himself says, that he is worth the amount specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution, and that he is a resident of Weber County aforesaid.

LESTER J. HERRICK,
WILLIAM W. BURTON,

Subscribed and sworn to before me as Notary Public in and Weber County this July 3rd, 1882.

[SEAL.] R. K. WILLIAMS, Notary Public.

Endorsed.

Winchester & Partridge Manuf'g Co.,
vs.
William W. Funge.

Undertaking on Appeal.

Filed July 3rd, 1882.

A. C. EMERSON, Clerk.
By A. R. HEYWOOD, Deputy.

In Supreme Court.

TUESDAY, January 3rd, A. D. 1882.

Winchester & Partridge Mf'g Co., Appellant,
vs.
W. W. Funge, Respondent.

This cause coming on regularly for hearing, was argued by Mr. R. K. Williams for appellant and J. N. Kimball for respondent. Submitted and taken under advisement.

SATURDAY, February 3rd, A. D. 1883.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, Appellants.
vs.
WILLIAM W. FUNGE, Respondent.
FROM 1ST DIST. COURT.

This cause having been heretofore argued and submitted, and the Court being sufficiently advised thereon it is now here ordered and adjudged that the judgment of the District Court herein, be and the same is hereby affirmed, and that respondent have and recover of and from appellant Dollars costs.

SATURDAY, February 10th, 1883.

* * * *

Winchester & Partridge Manufacturing Co., Appellant,
vs.
William W. Funge, Respondent.
FROM FIRST DISTRICT COURT.

In this cause appellant by its counsel prays the allowance of an appeal to the Supreme Court of the United States from the judgment of this Court herstofore entered, and asks that the amount of a *supersedeas* bond to be given thereon be now fixed, and thereupon it is ordered that said appeal be and is hereby allowed, and the amount of said bond be and is hereby fixed at $300.

In the Supreme Court of Utah Territory.

Winchester & Partridge Manufacturing Co., Appellant.
vs.
William W. Funge, Respondent.
} AFFIDAVIT.

TERRITORY OF UTAH, County of Weber. } ss.

Rufus K. Williams, being duly sworn deposes and says that he is counsel for the appellant in the above-entitled action, that said appellants are non-residents of Utah Territory, and that he resides in Weber County, in said Territory, and that appellants are absent from said Territory, and that he personally knows the amount in controversy in said suit, and that it exceeds in value over One Thousand Dollars.

RUFUS K. WILLIAMS.

Subscribed and sworn to before me this February 8th, 1883.

JOHN W. RENNICK,
[SEAL.] Notary Public in and for Weber County, Utah Territory.

Winchester & Partridge Manufacturing Co., Appellant.
vs.
W. W. Funge, Respondent.

Affidavit of R. K. Williams.

Filed and entered Feb. 10, 1883.

E. T. SPRGUE, Clerk Sup. Court.

In the Supreme Court of Utah Territory.

Know all men by these presents that we, Lester J. Herrick and Barnard White, are held and firmly bound unto William W. Funge, in the full and just sum of Three Hundred Dollars to be paid to said W. W. Funge, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, we bind

ourselves, our heirs, executors, and administrators jointly and severally by these presents, sealed with our seals and dated this ninth day of February, in the year of our Lord One Thousand Eight Hundred and Eighty-Three, and whereas, lately at a trial in a suit depending in the Supreme Court of Utah Territory, between the Winchester & Partridge Manufacturing Company and William W. Funge, judgment was rendered against the said Winchester and Partridge Manufacturing Company, and the said Winchester and Partridge Manufacturing Company having obtained and filed a copy thereof in the clerk's office of the said Court, to reverse the judgment in the aforesaid suit on an appeal having been granted by said Supreme Court of Utah, at same term in which said judgments was rendered, to the Supreme Court of the United States, at Washington, on the second Monday of October next.

Now the condition of the above obligation is such that if the said Winchester & Partridge Manufacturing Company shall prosecute the appeal to effect and answer all damages and costs, if it fails to make its plea good then the above obligation to be void, else to remain in full force and virtue.

LESTER J. HERRICK, [SEAL]
BARNARD WHITE, [SEAL]

Territory of Utah, }
County of Weber, } ss.

Lester J. Herrick and Barnard White, the persons named in and who subscribed the foregoing undertaking as the sureties thereto, being severally duly sworn, each for himself says: That he is worth the amount specified in said undertaking and bond as the penalty thereof, over and above all his just debts and obligations, exclusive of property exempt from execution, and that he is a resident and freeholder within the said Territory and County.

LESTER J. HERRICK,
BARNARD WHITE.

Subscribed and sworn to before me, this 9th day of February, 1883.

R. K. WILLIAMS,
[SEAL.] Notary Public in and for Weber County, Utah Territory.

This bond is approved, February 10th, 1883.

JOHN A. HUNTER, Chief Justice.

Winchester & Partridge Manufacturing Co.,
vs.
W. W. Funge,

Bond on Appeal.

Filed February 10th, 1883.

E. T. SPRAGUE,
Clerk of Supreme Court.

Territory of Utah,
County of Weber. } ss.

In pursuance of an appeal allowed by the Supreme Court of said Territory in the suit of the Winchester & Partridge Manufacturing Company, appellant, vs. William W. Funge, respondent, I, E. T. Sprague, Clerk of said Court, herewith transmit to the Supreme Court of the United States the annexed transcript of the record and proceedings in said cause, and of an affidavit of the value of the matter involved therein and of the bond on appeal thereof, and I hereby certify that said annexed transcripts of said record and proceedings, said affidavit: are true, full, and complete copies of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said Supreme Court of Utah Territory, this the 3rd day of April, A. D. 1883.

SEAL

E. T. SPRAGUE,
Clerk of Supreme Court.

109-651

OFFICE SUPREME COURT U.S.
FILED
OCT 22 1883
JAMES H. McKENNEY, Clerk.

SUPREME COURT OF THE UNITED STATES.

No.....

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, APPELLANT,

vs.

WILLIAM W. FUNGE, APPELLEE.

BRIEF AND ARGUMENT

—OF—

RICHARDS & WILLIAMS,
Attorneys for Appellant.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

FILED.....

IN THE SUPREME COURT

OF THE UNITED STATES.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY,
Appellants.

vs.

WILLIAM W. FUNGE,
Appellee.

Appellant assigns for errors:

1st—That the District Court erred in sustaining the demurrer and dismissing the complaint.

See Demurrer, Printed Record, page 28.

Judgment of District Court, page 30.

2nd—That the Supreme Court of the Territory erred in affirming said Judgment, page 35.

F. S. RICHARDS
and
R. K. WILLIAMS,
Attorneys for Appellant.

account of indebtedness made with the Semple & Birge Manufacturing Company, and making other purchases from appellant until November 28th, 1879, when the balance due appellant was Twenty-eight Hundred and Thirty-two dollars add Forty-five cents, and that a statement showing said balance was sent through the United States mail to said appellee, at said City of Ogden, August 2d, 1880, as shown in Exhibit D, page 20–21.

That having failed to get said indebtedness liquidated, appellant sent said claim October 6, 1880, to W. W. Burton & Co., as its agents, to Ogden, with directions to get it liquidated, that said appellee was then embarrassed and in laboring circumstances and a great portion of his property mortgaged to its full value, and he, unable to pay said claims and harrassed by other creditors, made a proposition to said Burton & Co. to settle said indebtedness to be submitted to appellant, and as a foundation thereto made out two lists of the various wagons he then claimed to have in the hands of his various agents, in the Territories of Idaho and Montana, all of which he affirmed to be in good condition and merchantable order, and offered to turn them over to said Burton & Co on appellant's account. List No. 1 was the manufacturers prices with the number of wagons. This is Exhibit F, pages 22–23, and to which is attached an affidavit of said Funge dated Ocober 6, 1880. in substance, stating that the wagons enumerated therein,are some of the wagons he purchased of Semple & Birge Manufacturing Company under the contract of December 6, 1878, that none of the wagons so enumerated had been sold and that all of them were then subject to his order,in the possession of the respective parties named, which affidavit is referred to as part of said Exhibit.

List No. 2, being Exhibit G, pages 23–24, contains the same list of wagons and in the hands of the same parties but includes freights and expenses, swelling the aggregate

value of the wagons from $2,315.71 as in list No. 1 to $3,528.00 as in list No. 2, that upon the presentation of these lists and the representation of appellee, Funge, that said wagons were in good condition and merchantable order and subject to his order appellants did authorize their agents Burton & Co. to take the wagons in payment on conditions that all said Funge's representations were true.

Whereupon October 28, 1880, said appellee, Funge, gave to said Burton & Co. the following described orders, to wit:

Page 4.	To James Burnside, Eagle Rock, Idaho, for one wagon, valued at	$125.00
Page 5.	To Caplice & Smith, Missoula, Montana, for three wagons, valued at	380.00
Page 5.	To George Dart, Bannock, Montana, for two wagons, valued at	240.90
Page 5.	To Kenon & Zenor, Deer Lodge, Montana, for five wagons, valued at	720.00
Page 5–6.	To F. E. W. Patton, Virginia City, Mon., for nine wagons, valued net at	912.50
Page 6.	To John Wells, Glendale, Montana, for six wagons, valued at	837.00

That at the same time and as part of the same transaction said Burton & Co. executed and delivered to said appellee, Funge, and which he then and there accepted, a receipt, (Exhibit H, pages 24–25), for said order and wagons therein named, in liquidation of appellant's claim, of $2,832.42.

"*Provided the said wagons are delivered to said Winchester*
"*& Partridge Manufacturing Company or their agents, W.*
" *W. Burton & Co.,*" *in good condition and merchantable order,*
"*at the respective places named and as set forth in said orders*
"*on presentation thereof.*"

That each order expressed that the parties addressed were to deliver the wagons therein named to said Burton

& Co., or account to them for the same. That Burton & Co. immediately wrote to the respective parties informing them of said order, and requesting them to press the sale of the wagons.

That when said orders were delivered, October 28th, 1880, said wagon in the hands of Burnside had been exposed for a long time without proper storage and protection, and was greatly weather-beaten, and injured thereby, had been used, and one bolster broken, and was then reasonably only worth $75.00, whereas, if in the condition represented it would have been worth and could with reasonable diligence have been sold for $125.00. Whereas, it was sold at its full value $75.00. That the three wagons in the hands of Caplice & Smith had also been exposed to the weather without protection and shelter, and were greatly weather-beaten and injured, and that after due and reasonable diligence only two of said wagons could be sold, and that for Two Hundred and Thirty Dollars, which was their full value in the condition they were in, on October 28th, 1880; the other wagon could not be sold. That if they had been in the order as represented they would have been worth, and could with reasonable diligence, have been sold for $380.00 over and above expenses of sale.

That the two wagons in the hands of George Dart had likewise been greatly injured for want of storage, shelter, and protection, by being weather-beaten; that one had previously been used, and a spoke broken out of one wheel, and by which said wagons were greatly injured, and were not reasonably worth over $190.00, and could only be sold for that amount, after due and reasonable diligence, but if they had been in condition represented they would have been worth $240.00, and could have been sold for that sum net over and above expenses of sale.

That the five wagons in the hands of Kennon & Zenor had likewise been exposed and weather-beaten for

want of shelter and protection, and were reasonably worth only 433.60, when said order was given, and could only be sold for that amount, whereas, if in the order represented, would have reasonably been worth $755.00, and could have been sold for that sum, and would have netted $720.00 after paying expenses of sale.

That when the order on F. E. W. Patton was drawn for nine wagons, there were only five wagons in his hands, and these were greatly injured for want of shelter and protection, and were not reasonably worth over $500.00 and could only be sold for that sum; whereas, had all the nine wagons been on hand and in the condition represented, they would have been reasonably worth $1015.00, and could have been sold for that sum and netted, after paying expense of sales, the sum of $913.50.

That the five wagons in the hands of John Wells had been so greatly injured by exposure to the weather, without shelter for a long time, and was so weather-beaten that only four could be sold, and these for only Four Hundred Dollars, which was their full reasonable value, whereas, had they been in the condition represented, they would have been reasonably worth $891.00, and could with reasonable diligence have been sold for that sum, and have netted $837.00 after paying expenses of sales.

That the wagon turned over to Burton & Co. had not been seen by them, that they relied solely on Funge's representation of its condition, but that instead of being in merchantable order and good condition, as represented by him, it had been greatly injured by exposure for a long time to the weather, without shelter, was without a bed, the running gear incomplete, had no tongue, no stay chains, nor double nor whipple-trees, and was so badly injured and incomplete as to be almost entirely worthless and entirely unsaleable.

That said appellee, Funge, had not found and provided necessary storage and protection for said wagons as he

had agreed and undertaken in said contracts of March 25th and December 6th, 1878, but had neglected to do so, whereby said wagons were greatly injured and damaged, and lessened in value. Nor were said wagons in good condition and merchantable order when said several orders and said receipt of October 28th, 1880, were executed and delivered.

That October 21st, 1881, and within reasonable time of the sales, said appellee had been notified of the sales and the net amount thereof, and that the unsold wagons were at his disposal and subject to his orders.

That after crediting said appellee with the net proceeds of said sales, and of four wagons since sold by John Wells, of Glendale all amounting to Eighteen Hundred and Seven Dollars and Forty-three cents, the appellant demands judgment of this Court for the sum of Fourteen Hundred and Forty-four Dollars and Ninety cents with interest thereon from date of filing.

The second count or cause of action set out in the complaint avers the making of said contracts of March 25th, 1878, and December 6th, 1878, by appellee with the Semple & Birge Manufacturing Company. The purchase of wagons from said company by appellee until previous to May, 1879, he owed said company $3963.65, and the assignment of said contracts and indebtedness of appellee by the said Semple & Birge Manufacturing Company, in May, 1879, to this appellant, and refers to said Exhibits A, B, and C, as part of this count.

That on the———day of August, 1879, an account was stated between plaintiff and defendant, and that a balance of $2832.40 was found due from the defendant Funge to the plaintiff, now appellant, and that it all remained due except the credits thereinafter mentioned; the net proceeds of certain wagons sold by plaintiffs' agents amounting to $1417.83, an account of which was rendered to defendant October 20th, 1881, and the net

proceeds of four wagons then in the hands of John Wells, and which were sold in February, 1882, for $400 less the expense of sale, leaving a net credit of $290.00.

That the amount found due said plaintiff—now appellant—should bear interest at rates of ten per cent. per annum from said day of August, 1880, until 21st of October, 1881, and amounted to $322.56.

And demanded judgment on this count for $1444.90, together with interest, costs, etc.

After service of process, the defendant—now appellee—Funge, appeared by his attorneys, Messrs. Kimball & Heywood, and filed a demurrer, and assigned as cause thereof:

1st.—That the complaint does not state facts sufficient to constitute a cause of action.

2d.—That for separate demurrer to first count that it does not state facts sufficient to constitute a cause of action.

3d.—That as to the second count, it does not aver facts sufficient to constitute a cause of action.

May 1st, 1882, this demurrer was argued by the counsel for the respective parties, and held under advisement, by the Court, until June 3d, 1882, when it was sustained by the Court, and the plaintiff's counsel electing to stand by the complaint, the Court rendered judgment for the defendant; and from which plaintiff prosecuted an appeal to the Supreme Court of the Territory, which affirmed said judgment, on the 3d day of June, 1883 (page 35), and appellant prayed and was granted, an appeal, the same term, by the Supreme Court of the Territory, to the Supreme Court of the United States, on the filing of affidavit of amount in controversy, and executing an undertaking then approved by the Court. Page 35—37.

The sustaining of this demurrer, and dismissing the plaintiff's suit by the District Court, and the affirmance of the judgment by the Supreme Court of the Territory are the errors complained of, and now assigned for cause of reversal.

The following statutes, and parts of tne Statutes of Utah Territory are relied on by appellant:

Section 1229 Compiled Laws, p. 402, and being Sec. 4 of the Civil Practice Act: "Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act."

Section 1230 Compiled Laws, being Sec. 5 Civil Practice Act: "In the case of the assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off, or defense, existing at the time or before the notice of assignment."

Section 1289 Compiled Laws, and being Sec. 64 Civil Practice Act: "The plaintiff may unite several causes of action in the same complaint, when all arise out of:

"First—Contracts express or implied."

Section 1265 Compiled Laws, and being Sec. 40 Civil Practice Act: "The defendant may demur to the complaint within the time required in the summons to answer when it appears on the face thereof, either:

"First.—That the Court has no jurisdiction of the person of the defendant, or the subject of the action; or:

"Second.—That the plaintiff has not legal capacity to sue; or:

"Third.—That there is another action pending between the same parties for the same cause; or:

"Fourth.—There is a defect or misjoinder of parties, plaintiff or defendant; or:

"Fifth.—That several causes of action have been improperly united; or:

"Sixth.—That the complaint does not state facts sufficient to constitute a cause of action; or:

"Seventh.—That the complaint is ambigious, unintelligible, or uncertain."

Section 1266 Compiled Laws, and being Sec. 41 Civil Practice Act: "The demurrer shall distinctly specify the ground upon which any of the objections to the complaint are taken; unless it does so it may be disregarded."

The Court will perceive that there is no demurrer under the 5th clause of Section 1265, on account of the improper uniting of causes of action, and if there had been the uniting of these causes, is authorized by Sec. 1289 Compiled Laws, above quoted. Nor is there any cause assigned under the seventh subdivision of Section 1265. The demurrer is framed solely for the cause set out in the sixth clause of Section 1265 Compiled Laws, and if either count, or both counts, set out a cause of action, the District Court erred in sustaining the demurrer and dismissing the complaint, and the Supreme Court of the Territory erred in affirming the judgment. As neither the Court below nor the Supreme Court of the Territory has deigned to inform the parties, or this Court, in the record, of the reasons for the decision, it is left wholly to conjecture to imagine the principles upon which the decisions are based.

If we were to guess, it would be that the two counts of the complaint have been confounded and confused, and the allegations of the first have been transported to and injected into the second, whereby the courts have concluded that the whole matter between these parties had been adjusted and agreed on, and that only a suit for false and fraudulent representations by appellee could be maintained by appellant, but whether these or other reasons controlled the courts, we apprehend a grave error has been committed.

Previous to the transactions of October 28th, 1880, when the various orders by Funge to Burton & Co. as agents of appellant, and the delivery of the receipt by them to Funge were made. Funge, the appellee, owed the appellant $2832.42. Were those orders then delivered as, or the wagons received as, unconditional payment? If the orders and wagons were received, and if *in good condition and merchantable order*, to be taken as payment, were they in such condition and order? If not in the order affirmed and represented to be and those in the hands of F.E.W.

Patton were short four, is Funge to go free of all his responsibility on account of the condition and number of wagons being misrepresented? Or, if he be liable therefor, is not such liability properly shown and set out in the first count of said complaint?

As the second count goes for a balance due on a stated account, growing partly out of the written contracts and dealings with the Semple & Birge Manufacturing Company which had been assigned to said plaintiff, below, and partly with it, how could those orders and the receipt of October, 1880, or the wagons, cut a figure on demurrer? Could the Court legally determine that the credit placed on its demands on Funge by the plaintiff in the second count were the wagons and the proceeds of the orders, etc., set out in the first count, and so determine that the second count did not aver facts sufficient to constitute a cause of action? If the defendant below—Funge—was dissatisfied with the credit allowed, was he bound to accept it any more than if it had not been mentioned? And could he not have presented his whole claim of defense? And if he had done so, would not the order and condition of the wagons, as well as the failure to have all that he gave order for have been considered and deducted from his claim? In other words, would not his defense have been allowed only so far as it was just and reasonable? And could he have claimed any more than the reasonable value of the wagons, which he then had and in their then condition?

The proper solution of these questions, we suppose, will demonstrate whether there is a cause of action set out in the complaint.

We are met, at the start, with the pregnant fact that a defaulting, hard-pressed and laboring debtor, owing a large sum to a long-deferred creditor, instead of paying the money, proposed to arrange his indebtedness in property scattered over two or three Territories. That further indulgence could not be granted, nor could the creditor

nor its agent travel around to ascertain the condition of the property, but, relying on the previous covenants of the debtor, and his then representations, part of which was by solemn, legal oath, it was agreed that the wagons should be placed under the immediate custody of the creditor by its agents, Burton & Co., and that if the wagons should then be *in good condition* and *merchantable order*, and to the number mentioned they should be received as payment; but there was no contract to receive them as payment in any other condition, or in any less number. Nor was there any contract that they should be returned to Funge, but the object of securing the debt and the whole transaction implies that the creditor was to have the selling of the wagons at a fair market price in their then actual condition, and were to be received as payment only on the stipulated conditions. And this is made manifest by this provision in the receipt executed and delivered by Burton & Co., to Funge, to wit:

"And it is understood and agreed that if said wagons "are so delivered in good condition, and promptly, as "aforesaid; they are to be sold to the best advantage, and "for the highest prices that can be obtained for them; "and any surplus of the proceeds thereof that may re- "main after paying said debt of $2832.42, and the actual "and necessary cost of selling the same is to be refunded "to said Funge, unless prior to that time he shall have "been paid Two Hundred Dollars ($200), which he agrees "at their option to take in lieu of samples, and in full "settlement of his account with said company."

Whilst the orders placed the wagons under the immediate custody of the creditor, yet it was not bound to then accept them as payment, and indeed the wagons, even if as represented were to be sold for the best market price, and after defraying the expense of sale, and paying the debt, Funge was to have the surplus, unless the creditor prior to the sale should determine to pay Funge

Two Hundred Dollars, so this was really a conditional arrangement throughout. But the immediate control of the wagons, what there was of them, and no matter as to their condition, was placed under the control and custody of the creditor, as the best and only security it could then get from a failing debtor. And it was agreed then to put the wagons in the custody of the creditor, *not to keep, but to sell*, and if all the wagons then represented by the debtor were on hand and in the condition represented, they were to be taken as payment, with the further condition that after paying expenses and the debt, if there should be a surplus of the proceeds of the wagons, this surplus should be paid to Funge.

Beside being true in fact, the demurrer confesses every pertinently pleaded or averred fact, and it is amply averred in the first count that the number of wagons represented and sworn to by Funge were not on hand, nor were those that were on hand in the condition represented but all of them had been greatly injured and lessened in value by exposure to the weather, without storage or shelter, for a long time.

That the several orders by Funge to Burton & Co., and the latter's receipt to him, on October 28th, 1880, being one transaction, are to be ~~construed~~ together, and the terms thereof binding on both parties, is a legal proposition not likely to be controverted, but if it should be, the single case of Feldman vs. Beier 78, N. Y. 297, is deemed ample authority.

That the orders and receipt passed by and between Funge and Burton & Co., October 28th, 1880, neither merged, discharged, nor paid the original indebtedness of Funge to Winchester & Partridge Manufacturing Co., are propositions which we shall attempt to fortify by authorities.

The orders and receipt executed and delivered Oct. 28th, 1880, were of no higher or solemn character of in-

truments than the original contracts of March and December, 1878, Exhibits A and B, pages 15—19. Indeed, the latter was under seal, whilst the orders and receipt were not. That such papers do not merge the previous obligations is too well settled to consume time in argument or recital of authorities. Nor did said papers work either a discharge or payment of the previous indebtedness.

This question has been before this Court in so many phases, that a brief reference to the cases will suffice. In Lefman et al., vs. The Bank of the United States 12 How., 243, plaintiffs in error had purchased the property and assets of the Burlington branch of defendant in error, and had executed four several notes, payable to the cashier or order. The suit was for the last installment. The declaration contained the usual money counts, an account stated, and also counts for the original consideration of the notes." The last note being offered to sustain the plaintiff's claim on objection was ruled out. It was objected that plaintiff's could not recover on counts for the original consideration, because the notes had been received in payment and satisfaction of the debt, and that the recovery could only be on the notes. "But the Court held that the mere acceptance of the notes did not necessarily operate a satisfaction; and that, whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transaction warranted such an inference, were questions for the jury," and this Court affirmed this ruling.

In Vasy vs. Lovy 13 How., 357, this Court held that "At law, a mere accord is not a defense; and before breach of a sealed instrument, there is a technical rule which prevents such an instrument from being discharged except by matters of as high a nature as the deed itself. But in equity, the Court will treat the creditor as if he had acted conscientiously and accepted what he had agreed

to accept, and that it was his own fault only that he had not received." In this case, it had been agreed to discharge a bond which had a long time to run in certain property, part of which had been paid, and the debtor had been ready at all times to deliver the remainder when called for. Here then was an express agreement on a valuable consideration, and the debtor had and was ready for a strict compliance and equity would hold the creditor to a compliance with the last contract.

The next case is that of Downey vs. Hicks, 14 How., 246. Hicks in his lifetime in January, 1839, was indebted to Downey on settlement $9,799.00. Hicks' brother, John R. Hicks, as Downey's friend, received a certificate of deposit from the Mississippi Railroad Bank, at Natchez, payable 1st November following. In February, 1839, when he returned to North Carolina, where he and Downey lived, the debtor and decedent, Joseph T. Hicks, then living in Mississippi, he handed the certificate of deposit to Downey who received it saying he would have preferred gold and silver, but nothing further. The bank failed without paying the certificate, and before it was due. After hearing all the evidence the Court instructed the Jury:

"1. That the acceptance by the plaintiff of the certificate of deposit for a precedent debt due him by Hicks or Hicks vs. Arnold was no payment or extinguishment of such debt, unless there was an express agreement to accept it as such payment; and to take the risk of the solvency of the bank.

"2. That the certificate of a bank due at a future day, like the note of a third person, if given for a pre-existing debt, is not payment and discharge thereof, unless specially agreed to be so taken, and if a receipt in full be given, it is still a question of fact for the Jury to decide whether there was such an agreement or not; and that unless the certificate be afterwards paid by the bank, it is *prima facie* no satisfaction of a pre-existing debt."

The third instruction has no bearing on this case, but all the three instructions were affirmed as good law by this Court.

And this general doctrine was announced by this Court in an opinion by Mr. Justice Field, 17 Wal., 670. The *Emily Louder*, in which after saying that the drafts by the captain on the owners were received as conditional payments, only, the Court proceeds to say: "Such would be the presumption of law in the absence of any direct evidence on the point. * * * On principle, nothing can be payment in fact, except what is, in truth, such, unless specially agreed to be taken as its equivalent.

These principles of law were subsequently affirmed by this Court, in "The Kimball" 3, Wallace 45. The Supreme Court of California, in several cases, have adjudicated the same way.

12 California, 321, Griffith vs. Grogan 23 Cal., 322. Welch vs. Allington, the Court held that where the note of a third party was delivered to a creditor, and it was destroyed, still this was no payment unless expressly agreed.

50 Cal. 165, Brown vs. Olmstead. A draft by a broker on a banking firm was obtained by a debtor, and paid on his note to a creditor, and the note surrendered, but the draft was not paid, held no payment unless expressly agreed to be received as such.

The Supreme Court of Ohio has gone quite as far as either the United States Supreme Court, or that of California.

In Merrick vs. Boury & Sons, 4 Ohio Stat., 64, held that where a note was executed by a vendee of goods subsequent to the purchase, and the vendor and payee without fraud made such an alteration as rendered it invalid. Still, this did not preclude a recovery on the original consideration and indebtedness, because it was agreed to take the note in payment.

In Westfall, Stewart & Co., vs. Bradley 10, Ohio St. 180. Bills on a bank which had stopped payment, but which was not known to either party, was paid by a debtor and received by the creditor as payment. The debtor, within a reasonable time after being informed of the bank's failure, offered to return the bills, and on suit it was held the loss must fall on the debtor, for the bills had ceased to be the representation of money, and there was no agreement to take them in their then, unknown, condition.

In Sutliff vs. Atwood 15 Ohio, St. 198. Held that the execution of notes by a lessee to the lessor, was not a payment of the rent, nor precludes a recovery from an assignee of the lease for the term of his enjoyment.

The Appellate Court of New York goes quite as far as either.

In Hill vs. Beebee, 13 N. Y. 560, involved the question whether a second mortgage for the same and an additional debt discharged the first mortgage, for, if so, an intervening mortgage to another party held priority. At pages 562—3, the Court held that the first note did not pay the debt, that the first mortgage was given to secure the debt, that when the first note was surrendered on another note, and mortgage was taken that the debt remained still unpaid, and the notes were only evidence of the indebtedness that the mortgages were made to secure the debt and not the notes, and that the second mortgage could in no wise discharge the first, unless expressly so agreed, which was not the case.

And in Roberts vs. Fisher, 43 N. Y. 161. Held, where the note of a third party was delivered and accepted as payment, and so found by the jury, yet, as this third party was then insolvent, and this unknown to the creditor, that: "Upon broad principles of justice, it would seem that a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be

good." The Court then proceeds to elaborate this justice.

The Supreme Court of Wisconsin holds to the same doctrine, Sec. 14, Wis., 39, Eastman vs. Porter; same 277 Webster vs. Slaotoer.

"And this same doctrine is virtually affirmed by the Supreme Court of Utah Territory, 2 Utah 421., Doane vs. Clinton, in which the debtor gave two negotiable notes at three and six months for the amount of the claim, and it was insisted that these notes liquidated the account, and displaced the lien under the Mechanics' Lien Statute. The Court held that the notes were no payment of the account, unless shown to be so intended by the parties, and goes on to say that "securities are in their nature cumulative, and there is no reason why the Court should consider that by taking one, a party thereby released another, unless there was some stipulation or understanding that such should be the case."

In the St. Louis Central Law Journal, vol. 11, page 364, is an able and elaborate article, citing many authorities to establish this legal proposition, *that nothing is payment on a pre-existing debt but money, unless expressly agreed to be received as payment;* and some authorities go so far as to say not even when so expressly agreed to be received.

But an overwhelming current of authorities both English and American, do establish that nothing but money makes payment or discharge of a debt, except by the express agreement of the creditor. In this case, now at bar, there was no express agreement to receive either the orders or the wagons as payment, only on condition that the *number of wagons*, as expressed in each order, *were on hand*, and in *good condition* and *merchantable order*, and the statement of the complaint shows that the number of wagons were short, and none were in *good condition* or *merchantable order*, and this provision being inserted in the receipt of Burton & Co., to Funge, of Oct. 28th, 1880, Exhibit H., p. 24–25, how could the Court

treat it as payment and discharge? But even if the Court treated it as a discharge, certainly Funge was responsible for his false affirmation as to the number and condition of the wagons, and if so, that liability is well set out in said first count of the complaint. If it be replied that there are two causes of action joined in the same count, the answer is, that it is now too late to spring that objection, as it was not assigned as cause of demurrer, as it might have been under the 5th subdivision of Section 1265, Compiled Laws, or 40th Section of the Civil Practice Act, and must be deemed as waived. The only question before the Court on this count is, does it state facts sufficient to constitute a cause of action. If it does, either on the original indebtedness or on the false representations as to the number and condition of the wagons on or before October 28th, 1880, then the demurrer should have been overruled as to this count, and the party put on his defence, and the Court fatally erred in sustaining the demurrer.

And so, even if the blending of the two causes together, if such be the case, confused or rendered the count ambiguous, as it should have been especially assigned, as cause of demurrer, under 7th subdivision of Sec. 1265. See Walson vs. S. F. & H. B. R. R. Co., 50, Cal. 524.

But say that, peradventure, we should be mistaken as to the first count in the complaint, how can the orders and receipts given October 28th, 1880, cut any figure, or at all be considered on the demurrer to the second count? As to it the same kind of general demurrer for want of stating sufficient facts to constitute a cause of action only is made.

The several counts of a complaint must be treated the same as if they were that many distinct and independent complaints, or suits. The second count, page 13 Printed Record, avers that the defendant entered into a written contract, dated March 25th, 1878, with the Semple & Birge

Manufacturing Co., a copy of which is made part of this count, Exhibit A., p. 15–17, printed record; and that subsequently, December 6th, 1878, he entered into another written contract with them, a copy of which is made part therof, Exhibit B, p. 17–19, that under said contracts, and especially the latter, the defendant ordered wagons, etc., until previous to May, 1879, he was indebted to said Company $3963.65, as per statement, Exhibit C., p. 19–20. That in the month of May, 1879, the Semple & Birge Manufacturing Co., for value, assigned said contracts and the defendant's indebtedness to the plaintiff, Winchester & Partridge Manufacturing Co., and of this defendant had due notice. That after this transfer and notice thereof, defendant continued to make other purchases of plaintiff, and make payments until November 28th, 1879, the balance due the plaintiff, was $2832.40, or per Exhibit D, p. 20–21. That on the——day of August 1879, the plaintiff and defendant stated their account, and upon this statement $3,663.65 was found due the plaintiff. That on the———day of August, 1880, the plaintiff and defendant again stated their accounts, and there was then found due the plaintiff $2,832.40, and that this sum still remains unpaid except an acknowledged credit for $1,417.83 and another of $390.00, and that the balance so found due should bear legal interest at rates of 10 per ct. per annum from August 1880 until 21st of October, 1881, amounting to $322.00, and after deducting the credit of $1417.83, left a balance due the plaintiff of $1737.00, and that the same rates of interest on this sum should be allowed for four months, amounting to $57.90, and after deducting the credit of $390.00 still left due the plaintiff at the filing of this complaint $1,454.90, and judgment for this sum is demanded.

That "each separate cause of action stated, must be complete in itself, and must stand by itself," is a rule so familiar as scarcely to need citation of authorities, but

Sec. 1, Estee's Pleadings, p. 531, Note 10, and authorities cited, 1st edition. Tested alone by the averments of this count, is it possible that any legal or plausible reason can be assigned why it does not set out a good cause of action? It is alone by confounding the allegations of the two separate counts, and then misinterpreting the allegations of the first, and injecting them into the second count, and their misapplying the law, that even a plausable ground for the demurrer to the second count can be found. Should it be urged in defence of the Court's judgment on the first count, that the time between the delivery of the orders and receipts in October, 1880, and the actual sales of the wagons was unreasonable, and should preclude plaintiff's action, it may be replied that Mr. Funge, in his affidavit, made October 6th, 1880, p. 23, shows that he had been trying, diligently, and more than ordinarily so, for near two years, to sell the wagons, and had failed, whilst plaintiff sold them, in their damaged condition, in about half that time.

Besides, it is averred that plaintiff used due and ordinary diligence in selling the wagons, but that their damaged condition made it the more difficult to procure purchases. And this is but a common-sense view that the Court would take without such an averment.

But this would, at best, be but an issuable fact, finally to be decided by the jury, and not a question of law to be determined by the Court on demurrer.

In the language of the Appellate Court of New York, "Upon broad principles of justice," as well as the violated principles of law, we most respectfully ask that the judgment in this case be reversed, and the cause remanded for a trial on its merits.

F. S. RICHARDS
AND
R. K. WILLIAMS,
Attorneys for Appellant.

109-651

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SUPREME COURT OF THE UNITED STATES.

No.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, APPELLANT,

vs.

WILLIAM W. FUNGE, APPELLEE.

BRIEF AND ARGUMENT

—OF—

KIMBALL & HEYWOOD AND
ENOS D. HOGE,
Attorneys for Appellee.

APPEAL FROM THE SUPREME COURT OF UTAH TERRITORY.

FILED

IN THE SUPREME COURT

OF THE UNITED STATES.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY, Appellant,

vs.

WILLIAM W. FUNGE, Appellee.

BRIEF FOR APPELLEE.

It appears from the complaint that by reason of various transactions between Appellant and Appellee, prior to October 28th, 1880, the Appellee had become indebted to Appellant in the sum of $2,832.42, that on said day negotiations for a settlement of said indebtedness terminated in a proposition by Appellee to deliver to Appellant the wagons described in the complaint on pages from four to seven, then owned by Appellee and in the posession of his agents at divers places;—for which wagons Appellee gave orders to Appellant on his

agents, and took from Appellant the receipt and contract, (Exhibit H, Record pages 24 and 25,) which is in the words and figures following:

OGDEN, Utah, October 28, 1880.

"Received from W. W. Funge orders on the respective parties, named in the annexed list, for wagons therein mentioned, which wagons are to be received in payment of the claim of Winchester & Partridge Manufacturing Company against said Funge for Twenty-eight Hundred and Thirty-two Dollars and Forty-two Cents; PROVIDED, The said wagons are delivered to said Winchester & Partridge Manufacturing Company, or their agents W. W. Burton & Co., in good condition and merchantable order, at the respective places named in said orders and on presentation thereof, and it is understood and agreed that if said wagons are so delivered in good condition and promptly as aforesaid, they are to be sold to the best advantage and for the highest prices that can be obtained for them, and any surplus of the proceeds thereof that may remain after paying said debt of $2,832.42, and the actual and necessary cost of selling the same, is to be refunded to said Funge, unless prior to that time he shall have been paid Two Hundred Dollars ($200.00), which he agrees, at their option, to take in lieu of said surplus, and in full settlement of his account with said company."

"W. W. BURTON & Co."

Subsequently to this contract the Appellant, through its agents, presented the orders and received and sold the wagons. See Record pages 6 to 13.

The complaint sets up all the facts very fully, and the question is, does it state a cause of action. The

solution of this question depends upon the construction of the above contract, and the effect the acceptance and sale of the wagons by Appellant should have. The contract is an executory one, and so far from the receipt of the orders being on delivery of the wagons, as contended by Appellant, the contract expressly excludes any such construction. The delivery of the wagons is expressly postponed until the orders could be presented, and they were only to be received if they fulfilled the terms of the proviso.

The wagons were, upon presentation of the orders, delivered to Appellant, and by it accepted and sold.

The Appellee was then completely discharged from any liability to Appellant, unless there was a warranty, by him, of the quality of the wagons, the receipt and acceptance could be for but one purpose, viz: the payment of the debt. The use of the language in the proviso, "in good condition and merchantable order," is the only place that the quality of the wagons is referred to and so far from being a representation or warranty by Appellee that they were in good condition and merchantable order, it is a condition imposed by Appellant, and a reservation by it of a right to judge for itself at the time of the delivery.

The Appellant having reserved to itself the right to inspect the property before its delivery, and the right to reject it if it did not fulfill the terms of the proviso; and having, after inspecting it, received it, cannot now be heard to affirm that it was different from what the contract called for.

"In cases of executory contracts for the sale and delivery of personal property, the remedy of the ven-

dee to recover damages, (this case is in effect an action to recover damages) on the ground that the article furnished does not correspond with the contract, does not survive the acceptance of the property by the vendee after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property."

"The retention of the property by the vendee is an assent, on his part, that the contract has been performed. The delivery of property corresponding with the contract is a condition precedent to the vesting of the title on the vendee."

This the vendee is to determine on the receipt of the property.

He is not bound to receive, and pay for a thing he has not agreed to purchase; but if the thing purchased is found, on examination, to be unsound, or not to answer the order given for it, he must immediately return it to the vendor, or give him notice to take it back, and thereby rescind the contract, or he will be presumed to have acquiesced in its quality. He cannot accept the delivery of the property under the contract, retain it after an opportunity of ascertaining its quality, and recover damages, if it be not of the quality or description called for by the contract."

Reed vs. Randall, 29 New York, 362.

McCormick, et al. vs. Sarson, 45 New York, 265.

The Dutchess Co. vs. Harding, 49 New York, 321.

The Gaylord Manufacturing Co. vs. Allen, 53 New York, 515.

Dounce vs. Dow, 64 New York, 411.

The reasoning of the above cases applies in the case at the bar with much more force than it did in the cases themselves. In all the above the contracts were for the sale and delivery of personal property, in which the vendors agreed to deliver merchantable property, while in this case the contract contains no representation by the Appellee that the property shall be of any particular description, but leaves the Appellant the option to receive or reject it after examining for itself.

In the complaint no fraud is imputed to the Appellee. It is true that the complaint, in words, charges misrepresentations as to the quality of the wagons, and that Appellant relied upon these representations, but the exhibits and contracts appended to it, as well as the acts of the Appellant under the contract, (Exhibit H,) show that no representations were made or relied upon, but it is insisted that the wagons were not in good condition and merchantable order, and that Appellant is entitled to recover as upon a warranty.

Here then there was a proposition on the one side to deliver the wagons in payment of a debt, and on the other to accept or receive them in payment of that debt if they were in a certain condition.

If the wagons when delivered did not fulfill the condition, the Appellant was under no obligation to receive them. The contract was at an end and Appelee would then have remained liable on his debt. But when Appellant received the wagons it affirmed that the conditions of the contract were fulfilled, and the debt was paid.

The Appellee by having the wagons on hand for delivery, when the orders were presented, had per-

formed his part of the contract. There remained nothing more for him to do.

It then rested with the Appellant to determine whether it were such as the contract called for, and whether it would receive them. When received, they IP SO FACTO became payment of the debt. Appellant had no right to receive them for any other purpose or at any other price. It cannot keep the wagons and pay for them at a less price than the contract price, as it attempts to do by this action, even if the contract should be construed to be an agreement by the Appellee to deliver the wagons in good condition and merchantable order. The acceptance by the Appellant would be an assent by it that they were so. The words used do not amount to a warranty by Appellee.

Ricketts vs. Hays, 13 Ind. 182.

McCornnell vs. Jones, 19 Ind. 329.

Leonard et al vs. Davis, 1st Black, 476.

It is insisted by Appellant that the terms of the contract show that the wagons were not to be received in full payment, but were only to be received to be sold, and the net proceeds credited on the debt.

The contract is not susceptible of any such construction. Its very terms exclude any such assumption.

The provision in the contract as to the sale of the wagons, is entirely independent of the preceding clause, and so far from weakening the effect of that clause strengthens it. It provides for a sale of the property, and for paying the surplus over and above the debt and expenses to Appellee. It makes no provision for recourse on the Appellee in case of a deficiency.

If it had been the intention of the parties that the Appellee was to remain liable for any deficiency, what would have been more natural than a provison to that effect? The fact that no such provision was made is conclusive that the wagons were to be received in payment in any event.

The contingency that there might be a deficiency, and that Appellee would remain liable therefor, was not contemplated by the parties—that there might or would be a surplus was.

It will be observed from an examination of the list attached to the contract (Record pages 23 and 24), that the value of the wagons greatly exceeded the debt. What more certain or more probable than that the Appellee would insist upon receiving, and that Appellant would provide for paying him this excess, after deducting expenses of sales. If Appellee had retained the wagons and sold them himself, he would have made the excess. By the delivery to and acceptance of the wagons by Appellant, the debt was paid. As this was all that Appellant desired, it was willing to give the Appellee the benefit of the excess.

Again, the sale of the wagons was not agreed upon, as a means of ascertaining the amount, to be credited upon the debt, but was one method of ascertaining what amount should be paid by Appellant over and above the debt.

It was not obligatory upon the Appellant to sell, it had an option to pay a fixed sum for the surplus, and relieved its self from the contract to sell.

It is contended by Appellant that the receipt of the

orders placed the wagons under its control from that date.

This is true, only, to the extent that they enabled it to obtain possession from Appellees agents. They did not make it obligatory upon the Appellant to receive or sell. It was only after the actual receipt of the wagons that the obligation to sell become binding upon or the duty of Appellant.

There being no warranty of the wagons by Appllee, it was the duty of Appellant to return them at once upon ascertaining that they did not correspond to the description in the contract.

This it did not do, but retained and sold them. It did not give Appellee notice that the wagons were defective until almost a year after the receipt of the wagons. (See Record, page 12.) The Appellee had a right from the silence of Appellant to suppose that it assented to the quality of the wagons, and that they corresponded with the contract. It was incumbent upon Appellant to give Appellee the opportunity to see the property himself, if it did not correspond to the contract, or at least to give him notice of the defects, so that he might have an opportunity to examine it and ascertain the quality for himself.

Reed vs. Randall, above.

Hopkins vs. Appleby, 1 Starkie 477.

It conclusively appears from the complaint that both counts therein stated are based upon the same transaction, and constitute but one cause of action, the same exhibits that are attached to the first count, are attached

to and made a part of the second. See Record pages 13, 14 and 15.

It also appears that Appellee is given credit for the wagons sold, on the account stated in the second count. The demurrer is to the whole complaint and to each count, the second count being for the same cause of action is equally with the first, obnoxious to the demurrer, and the reasons applicable to the first count are equally applicable to the second, and it is not necessary to reiterate them in this connection.

The fact that the pleader in drawing the compliment saw proper to state the same cause of action in seperate counts, in violation of all rules of pleading under the reformed mode of procedure, cannot obviate the objection raised by the demurrer. We therefore, submit that for the reasons herein-before set forth, the judgment of the Supreme Court of the Territory was right and should be affirmed.

ENOS D. HOGE,
Counsel for Appellee.

JAMES N. KIMBALL
AND
ABBOT R. HEYWOOD,
Attorneys for Appellee.

109-651

SUPREME COURT OF THE UNITED STATES.

No. 1024.

WINCHESTER AND PARTRIDGE MANUFACTURING COMPANY, A CORPORATION,
APPELLANT,

vs.

WILLIAM W. FUNGE, APPELLEE.

RESPONSE TO BRIEF AND ARGUMENT

OF APPELLEE'S ATTORNEYS,

Messrs. HOGE, KIMBALL & HEYWOOD,

—BY—

RICHARDS & WILLIAMS,
Attorneys for Appellant.

Filed.....

IN THE SUPREME COURT

OF THE UNITED STATES.

WINCHESTER & PARTRIDGE MANUFACTURING COMPANY,
Appellant,

vs.

WILLIAM W. FUNGE,
Appellee.

In reply to the printed brief and argument of appellee's attorneys, it will not be necessary to reiterate the arguments in the original brief, nor the authorities therein referred to, as these have not been controverted or referred to by appellee's attorneys only to a limited extent. Their arguments have wholly ignored all the previous transactions, representations, and affirmations by appellee previous to October 28th, 1880, when the receipt, Exhibit II, was executed and as set out in the ninth paragraph of the first count in the complaint. See printed record, page 3. And

passing over these actual and pregnant facts unnoticed, they base an argument upon artificial facts and the recital of inapplicable authorities, to establish principles, familiar to every well read lawyer, when the facts justify their application.

That in mere executory contracts for the sale and and delivery of personal property, the reception thereof, after examination, or an opportunity of examination, is generally conclusive upon the purchaser, and precludes either a defence to the recovery of the purchase price, or a suit for misrepresentation, is a familiar doctrine that we do not controvert, nor will we consume time in analyzing the several authorities referred to by appellee's counsel, as they are all of this character.

But is that this case? Were the motives and objects of the parties to these transactions alike to the motive and objects of parties to a mere bargain and sale, where each party, upon equal terms, trafficks in the hope of gain, and to better his condition, as an original transaction? Was there no pre-existing debt to secure? Was not the securing of a long standing debt by a long delayed creditor trom a dilatory debtor a primary object? Was a speculation in the wagons any consideration whatever to this creditor? Did it want the wagons at all, except as a means of securing a large and long overdue debt? Did the several orders for wagons of October 28th, 1880, put the wagons under the control of the creditor? If not, why use the legend found in said orders:—"Please deliver to W. W. "Burton & Co., or their order, the following Whitewater "wagons, *or account to them for the same from this date*"? which, with some verbal difference, is in all of them. See printed Record, pp. 4—6, This is perfectly consistent with the averments of the complaint. The wagons were placed in appellant's hands as collateral security, and to be sold in any event, with the further agreement and condition that if the wagons were on hand, in the numbers

and condition as represented, it would accept them as payment. And this is the only construction which renders the transaction, the language of the orders and receipt—Exhibit H—at all consistent or rational.

It was the then understanding of the parties that the wagons were placed under the control of the creditor, when the orders and receipt were executed, as security for the debt, and if in the condition, and as represented as to numbers, were to be received as payment. Any other construction renders the language of the orders and receipt meaningless, and thwarts and defeats the creditor from securing its debt or forces it to take fewer wagons and in a more damaged condition than agreed on and specified. In other words, such a construction does great injustice to a delayed creditor, and enables a dilatory debtor to pay his debt in property of neither the quantity nor quality agreed on. Whilst the true construction as understood and agreed on by the parties, and as insisted on by appellant, secures to the debtor every cent his property was worth at the time, and secured to him further indulgence, and saved him from bankruptcy.

The law in its persistent effort to dispense equal-handed justice, could never perpetrate such a monstrous wrong only through an obscurity of the facts, for when these are manifested it would abhor such a terrible injustice. But even on the hypothesis and theory presented by appellee's counsel he is responsible for the non-delivery of nine wagons; four of which were not in the hands of Patton when the order was drawn on him, and which never were delivered to or received by appellant or its agent, Burton & Co. And the five wagons then in the hands of John Wells, which were in such bad condition that, instead of being worth the $837.00, as specified in the order, could not be sold when Burton & Co. went to look after the wagons, and which Funge was notified could not be sold, October 21st, 1881, (see paragraph 9, first count of complaint, printed Record, p. 12) and which

were then offered back to Funge, but which he refused to receive, and four of which were afterwards sold by Wells, for Four Hundred Dollars, which Burton & Co. received from him, and for which appellee has credit. But there is still one left as never having been accepted, further than as collateral security.

In the eleventh paragraph of the first count of the complaint, printed Record, p. 11, it is averred "That "neither plaintiff nor its said agents had ever examined "the condition of said wagons, or any of them, but relied "entirely on the statements and representations of said "defendant, as to the condition and order and value of "said wagons and each of them, but *which representations* "*were false and untrue.*"

The principle of law is familiar that, if a vendor affirms and represents a fact which he does not know to be true, he is equally as responsible as if he knew it was false; the one is a legal, the other an actual, or moral fraud, and he is held responsible, whether it be the one or the other. The sound, merchantable condition of these wagons was not only affirmed by Funge, but the numbers were actually sworn to by him in his affidavit to list No. I (Exhibit F., printed Record, p. 23).

Appellee's counsel have unwittingly fallen into an error in their closing argument (bottom p. 8—9 of their Brief) in stating that the same exhibits made part of the first count are also made part of the second count of the complaint, when, in fact, only Exhibits A. B. and C. of the first count are referred to in the second count, leaving off Exhibits D, E, F, G, and H, of the first count, and this error pervades their entire argument as to the first and second count being for the same identical transactions. There is nothing more common than various counts seeking a recovery on the same liability, and which is not forbidden, but allowed by the Codes and the Practice Act of this Territory, as quoted in our

original Brief. But if this were not so, the objection has been waived, because not taken at the proper time and in the proper manner, and cannot now be considered by this Court. As conjectured in our original Brief, it is by transporting the allegations of the first count of the complaint and injecting them into the second count, that the demurrer as to the latter is attempted to be justified, which is contrary to all rules governing pleadings. And so far from being justified by any author, or decision of the Court of last resort in any of the States, or of the United States, it is not attempted to sustain it by reference to any authority whatever. And we will content ourselves by leaving it with a mere reference to our original Brief, and the great experience and intelligence of this ultimate Tribunal.

We conclude by again asking for a reversal, and for such judgment of this Court as is justified by law and its practice.

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Attorneys for Appellant.